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No. 97-1910

FILED
SEP 3 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

MARILYN ZIEMKE, CELIA SHAR and
ISRAEL TRAVEL ADVISORY SERVICE, INC.,
Petitioners,

v.

SHALOM ALMOG, IRIT ALMOG,
and BEN AMI GELLER,
Respondents.

On Petition For A Writ of Certiorari
To The Superior Court of New Jersey,
Appellate Division

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THIS COURT'S DECISION IN *DUN & BRADSTREET* LEFT OPEN IMPORTANT QUESTIONS REGARDING THE APPROPRIATENESS OF PUNITIVE DAMAGES IN A DEFAMATION CASE AND THERE EXISTS A SPLIT OF AUTHORITY ON THE ISSUE.

A. By Focusing on the Public-Concern Issue, Respondents Miss the Point; Certiorari Should Be Granted Because the *Dun & Bradstreet* Plurality Left Unanswered Important Questions Regarding the Appropriateness of Punitive Damages in a Defamation Context.

Respondents hinge their opposition to certiorari on their improper articulation of the issue as "whether the defamation was about matters of public concern," and their peculiar interpretation of the three-justice plurality decision in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 760 (1985), a decision they contend stands for the proposition that "absent public concern, there [are] *no* First Amendment limitations on the ordinary common-law concepts of libel and slander." (Gbo. at 9-13; Abo at 9-14, emphasis added.)[1] But petitioners have never claimed that the speech in this case involved matters of public concern, so they concede respondents' moot point. Nevertheless, the imposition of punitive damages still violates the First Amendment because, where actual damages can be ascertained, punitive damages — even in a private defamation case — unnecessarily chill and impermissibly punish speech.

At the heart of the *Dun & Bradstreet* plurality decision was the principle that in a *commercial speech case*, where *actual*

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[1] "Abo." refers to Almog's Brief in Opposition; "Gbo." refers to Geller's Brief in Opposition.

damages cannot be ascertained, presumed and punitive damages may be permitted as a substitute. *Id* at 760 (1985).[2] A contrary holding would not have achieved the legitimate goal of compensating *reputational* harm. *Dun & Bradstreet*, however, left unresolved many important questions: (1) are punitive damages appropriate when actual damages can be ascertained; (2) are punitive damages appropriate in a non-commercial speech case;[3] and (3) is there any limit to the amount of punitive damages that can be imposed in a defamation case. The last issue is especially important given the contemporary climate of punitive damages. *Dun & Bradstreet* was decided over a decade ago, when punitive damages did not reach the colossal heights they reach today. *See TXO v. Alliance Resources Corp.*, 509 U.S. 443, 500 (1993)(O'Connor, J., dissenting) (citing empirical evidence to show how punitive damages awards have been skyrocketing in recent years). This Court should grant certiorari so that the important issues raised above may be addressed in the current climate of punitive damages.

B. Petitioners' Cases Are Not the "Minority View;" They Evidence a Split in Authority this Court Should Resolve.

Geller asserts that the cases cited on pages 11-12 of the

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[2] This is consistent with the historical role of punitive damages, which were awarded to fill the gap left open by the unavailability of compensatory damages for pain, humiliation, and other forms of intangible injury. *See, Pacific Mutual Life Insurance Co. v. Haslip* 499 U.S. 1, 62 (1991)(O'Connor, J., dissenting).

[3] Respondents do not suggest that the speech involved in this case proposed a commercial transaction; accordingly they concede it is not commercial speech. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

Petitioner's brief, holding that punitive damages in a defamation case violate the First Amendment, represent the "minority view." (Gbo. at 12.) But Geller does not cite a single case that examined the issue and held to the contrary. While Almog cites *Food Lion, Inc. v. Capital Cities/ABC, Inc., et al.*, for a contrary proposition (Abo. at 11), he fails to address the analysis underlying petitioner's cases. Instead, both respondents simply parrot the conclusory assertion that the speech in this case was "egregious." (*See e.g.*, Gbo. at 23; Abo. at 5.) Even so, efforts to deter false speech, even egregiously false speech, still impermissibly "chill" true speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)(the possibility protected speech may be muted outweighs the potential harm to society in permitting some unprotected speech go unpunished).[4]

Without citations or analysis from Geller, and only a single citation from Almog, respondents' assertion that petitioners' cases are the "minority view" lacks merit. This assertion only highlights the existence of a split in authority regarding the constitutionality of punitive damages in defamation cases. Respondents do not provide any reason why this split in authority should not be resolved by this Court.

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[4] This is true not only because speakers of true speech might be afraid of an unfounded defamation suit, but also because what may be false speech in an evidentiary sense is not necessarily false speech in an epistemological sense. The accountant's report proving Almog's embezzlement provides an example. Respondents contend the report was not produced at trial. (Abo. at 2, n. 3; Gbo. at 3.) This is false. But because this evidentiary dispute does not demand the intervention of this Court, petitioners will concede the report was not admitted into evidence. This does not, however, mean the report does not exist; the truth of speech does not depend on whether it is admitted into evidence at a New Jersey trial.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE MANNER BY WHICH PETITIONERS WERE DEPRIVED OF PROCEDURAL DUE-PROCESS ESTABLISHED A DANGEROUS PRECEDENT CAPABLE OF REPETITION.

Modern judicial systems employ procedural safeguards to ensure litigants the rights guaranteed them by the Due Process Clause of the Fourteenth Amendment: "[1] careful instructions direct the juries' deliberations, [2] trial judges diligently supervise proceedings, watchful for potential sources of error and [3] appellate courts stand ready to overturn judgments when efforts to ensure fairness have failed." *TXO*, 509 U.S. 443, 474 (1993)(O'Connor, J., dissenting). A court's "duty to interfere with a disproportionate jury verdict is absolutely necessary to the safe administration of justice, and ought, in all proper cases, be asserted and exercised." *Id.* at 477. Unfortunately, by entirely abdicating their judicial obligations, and abandoning all three procedural safeguards, the state courts of New Jersey have foisted the "duty to interfere" on this Court.

Respondents do not adequately address petitioners' argument that the lump-and-dump instructions used in this case were not the "careful instructions" required by due process. First, respondents assert that petitioners did not object to the improper jury instructions. Respondents are wrong. (*See*, Pet. at 5, citing Da 461-467, Tr. 8/13/93, p.m. at 60-69; Tr. 9/21/93, pp. 59-62.) Then, respondents claim the lumping together was permissible because petitioners conspired to commit slander. (Gbo. at 17-20; Abo. at 22-24.) But the jury never made a finding of conspiracy, nor was a conspiracy interrogatory ever tendered. Finally, respondents ignore the impropriety of lumping petitioners together during the punitive damages phase. Due process requires individual determinations of guilt.

Not only did the trial judge overlook this "potential source of error," but as Geller acknowledges, the trial judge stated he would "attend to other judicial tasks while trial testimony was being provided." (Gbo. at 7.) This is hardly the "diligent[] supervis[ion] of [the] proceedings" referenced in *TXO*.[5]

Finally, the New Jersey appellate courts did not "stand ready to overturn judgments." For instance, citing court-backlog and a fear of a new trial, the appellate division was content to excuse the trial judge's conduct as a "procedural lapse." (App. 8, 15.) And since the New Jersey Supreme Court withdrew certification, petitioners were completely denied any review of the punitive awards. After March 1997, when the jury's verdicts first became operative, the punitive damage awards have not been reviewed by any court.

The lack of review was the result of the novel and unprecedented use of what has been termed "advisory jury verdict." As a result of this procedure, petitioners did not know whether they should actively participate in the punitive-damages phase of the trial when any verdict rendered by the "advisory" jury would not be operative and the bench verdict did not contain any punitive damages. Additionally, petitioners were prejudiced on appeal because they did not know whether, or how, the damages awarded by the "advisory" jury should be addressed on appeal, including the applicable standard of review and the manner in which issues relating to the

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[5] In a remarkable feat of rationalization, Geller suggests that by his inattentiveness, the trial judge merely reaffirmed the importance of the jury as the "most important function of the process." (Gbo. at 7.) But as this Court has noted, adequate review is the most important function of the process. *Honda Motor Co., Ltd., v. Oberg*, 512 U.S. 415, 420-21 (1994).

"advisory" jury's awards should be preserved for appeal.[6] For these reasons, the procedure sets a dangerous precedent with the potential to deprive future litigants of their due process rights. In any situation where there is doubt as to an issue, the judge may simply decide to institute procedures under which the case will be decided on both sides of the issue, with an invitation to the appellate court to pick the correct alternative.

III. THE *BMW* "EXCESSIVENESS INQUIRY" SHOULD BE LIMITED IN CASES INVOLVING INDIVIDUAL DEFENDANTS AND CASES INVOLVING SPEECH.

A. Certiorari Should Be Granted Because in a Case Involving an *Individual* Defendant, Courts Must More Closely Review Punitive Damages For Excessiveness.

The four cases within which this Court developed procedural and substantive standards to control punitive

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[6] Petitioners preserved their arguments as best they could under the circumstances. In both their motion for a new trial and in their brief to the appellate division, petitioners argued that the damages awarded by the bench verdict were excessive. In conjunction with this argument, petitioners noted that a similar excessiveness analysis could apply to the non-operative jury verdicts, but there was no reason to elaborate because the "advisory" verdicts were of no legal effect. Petitioners raised the First Amendment issue at their first opportunity: after the bench verdict was reversed and the "advisory" jury verdict was rendered operative. Prior to that time, the "advisory" jury's punitive awards were not at issue, nor was the First Amendment. Respondents' argument that petitioners waived the right to object to the excessiveness of the "advisory" jury's punitive award underscores the lack of procedural safeguards in this case. The very basis of respondents' waiver argument arises from the procedural failings for which petitioners seek review.

damages all involved corporations (Pacific Mutual, TXO, Honda and BMW), not individuals. While the ultimate refinement of the "excessiveness inquires," as set forth in *BMW*, may be workable when applied to a corporate defendant, individuals require qualitatively greater protection from excessive punitive verdicts. Because this Court has never examined the application of punitive damages to individuals, and because the concerns regarding "grossly excessive" and arbitrary awards are just as important– if not more important– in that context, this case is ripe for review.

Unlike corporations, individuals do not benefit from the limited liability afforded by the corporate form and can lose all of their assets by virtue of one annihilating punitive award. This distinction is crucial because, in a corporate setting, assets are more fungible and are not bound up with a person's sense of identity. *See*, Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 959-60, 978-79, 986-87 (1982) (some property, such as one's home, are central to personhood and deserve more protection that purely fungible goods). As petitioners stressed in their opening brief, in this case the defendants livelihood and very existence is at stake. (Pet. at 7.) Respondents ignore this underlying distinction.

Moreover, because corporations are fundamentally motivated by profit, which is unlikely to be deterred by incidental state regulation, *Virginia Pharmacy Bd. v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976), punitive damages serve a more important function when applied to a corporation. *See, Dun & Bradstreet*, 472 U.S. at 748. But with individuals, whose actions are often motivated by feelings and ideals and not necessarily profit, this rationale does not apply. Individuals tend to shape their conduct based on regulations and social mores, not civil damage awards. An especially important corollary to this point

is that individuals, unlike corporations, can be subjected to criminal liability for their wrongdoing. Consequently, punishment through money damages is not as necessary to control, deter or punish wrongful conduct in a case involving individuals.

B. Certiorari Should Be Granted Because in a Case Involving Speech Protected by the First Amendment, the Existing *BMW* Guideposts Are of Limited Utility.

When this Court decided *BMW*, it articulated three guideposts to be used in deciding whether a punitive damages award is "grossly excessive." *See. BMW*, 116 S.Ct. at 1598. While these guideposts can be employed in a wide spectrum of cases, they are of limited utility in a case involving speech.

For instance, the First Amendment entirely precludes utilization of the "reprehensibility" guidepost. To punish speakers more severely because their speech – even their defamatory speech – is "reprehensible," necessarily entails making the kind of content-based judgments held unconstitutional in *RAV v. St. Paul*, 505 U.S. 377, 384 (1992). To paraphrase that case, "the power to prescribe particular speech . . . on the basis of one content element," (*e.g.*, it is defamatory), "does not entail the power to proscribe the basis of the other content elements," (*e.g.*, it is "especially egregious" defamation).[7] This is because what is, or is not, "reprehensible" defamation requires making normative judgments about the idea expressed. So while, "false statement of fact" is neutral enough to support exclusion of the class of

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[7] Or, as the *RAV* court stated, "the government may proscribe libel, but it may not make the further content discrimination of proscribing only libel critical of the government" *Id.* at 384.

defamatory speech from full First Amendment protection,[8] "reprehensibility" is not "neutral enough to form the basis of distinction within the class." *Id.* at 388. Speech can be regulated based on the harm it causes (*e.g.* fighting words), or the risks it poses to human life (*e.g.*, "fire" in a theater), but not on its level of "reprehensibility." This is why petitioners focus on harm to others as the comparative gauge to measure degree of reprehensibility.

Almog correctly observes that the torture cases cited by petitioners in their opening brief are not wholly related to a defamation action.[9] (Abo. at 24.) Petitioners utilized this approach to demonstrate the types of conduct that are truly reprehensible for which large punitive damage awards have been allowed. Conduct is considered less reprehensible if it does not involve threats to the health and safety of others and is non-violent. *BMW*, 116 S.Ct. at 1599, and, therefore, a comparison of cases involving torture and sexual abuse of children is at least somewhat illuminating.

Similarly, while legislative sanctions on commercial speech have been upheld, legislative sanctions imposing civil or criminal liabilities on non-commercial speech are rarely upheld. Since all parties agree that the speech involved in this case does not meet the definition of commercial speech, the speech involved here is not the type of speech that can be easily

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[8] As noted in *RAV*, even defamation is not a "category of speech entirely invisible to the Constitution." *Id.* at 383.

[9] Almog wrongly accuses petitioners of misstating the amount of punitive damages awarded in the torture cases. (Abo. at 25.) In discussing those cases, however, petitioners cited the amount awarded to each individual plaintiff, not the total amount received by all plaintiffs; therefore, no misrepresentation has occurred.

regulated by a legislative body. Therefore, "comparative legislative sanctions" has limited, if any, utility.

This leaves ratio. This Court has eschewed an approach that focuses solely on the ratio between actual and punitive damages. *TXO*, 509 U.S. at 460. But in a speech case, ratio is the only guidepost that has any utility. So, to the extent punitive damages will still to be permitted in a defamation case, the *BMW* test needs to be limited in matters involving speech. Many existing tests have been altered, or applied more rigorously in a speech context. *See e.g., Stromberg v. People of the State of California*, 283 U.S. 359 (1931); *Ashton v. Kentucky*, 384 U.S. 195, (1966). The *BMW* test is no exception.

SUMMARY OF REASONS TO GRANT THE WRIT

[1] In *Dun & Bradstreet*, this Court left open the issue of whether punitive damages in a defamation case violate the First Amendment when actual damages are clearly ascertainable. A conflict among state courts exists on this issue as well. Given the current climate of "punitive damages run wild," they pose an especially dangerous threat to free speech. Accordingly, this is an opportune time for this Court to grant certiorari and examine this important constitutional issue.

[2] In this case, traditional procedural safeguards have been so dramatically deformed that they threaten to infect the procedural integrity of the judicial system. Petitioners urge this Court to exercise its supervisory authority, grant certiorari, and reverse this dangerous assault on due process.

[3] While this Court has recently examined the due process implications of punitive damages in a corporate context, it has not done so in a case involving individuals, nor in a case involving speech rights. These features justify certiorari in this case because the *BMW* test is not workable in such contexts.

Respectfully submitted,
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